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FILED

OCT 14 1960

FLOYD A. HICKS
COUNTY CLERK

BY _____ DEPUTY

Attorneys for Complainants

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF TEHAMA

10 ALFRED HERRICK, A. NORMAN, JOHN MEYER,
11 FRED A. MEYER, J. F. ARNOL, I. T. CRENSHAW,
12 IDA L. CRENSHAW, C. R. MIDDLETON,
13 R. L. ELLIS and GEORGE W. BORING,

Plaintiffs,

vs.

14 A. T. FORWARD, ALICE M. FORWARD, FRANK
15 FORWARD, WILLIAM E. WRIGHT, DIAMOND MATCH
16 COMPANY, a corporation, THOMAS B. ARMSTRONG,
17 LULU NULL, WALTER B. ARMSTRONG, LESTER ARMSTRONG,
18 ANNIE FARNSWORTH, ELLEN G. PRITCHARD,
19 LELAND PRITCHARD, EDWIN PRITCHARD, MILDRED
20 PRITCHARD, ROBERT PRITCHARD, FRANCES PRITCHARD,
21 F. W. GRAHAM, NETTIE M. GRAHAM, M. NIELSON,
22 RED RIVER LUMBER COMPANY, a Corporation,
23 B. F. DRIVER, T. MANASSE, FRANK WILLIAMS,
24 BEATRICE WILLIAMS, E. R. CARLSON, SOPHRONIA
25 GRAHAM, L. F. MOUNTS, CLARE P. HARRISON,
26 MRS. ANNA DE LA MONTANYA, JOHN DOE,
27 RICHARD ROE, MARY SNOW and SUSAN POE,

Defendants.

No. 4570

28 BUD RAY ALEXANDER, ALMA JEAN ALEXANDER, his
29 wife, JOHN ANDERSON, OPAL ANDERSON, his wife,
30 GEORGE ARCHER, ANNA L. ARCHER, his wife, C. R. BATTLES,
31 FRANK BETSCHART, ANNA J. BETSCHART, his wife, DALE T. CLAY,
32 PATRICIA D. CLAY, his wife, EDNA F. DAVIDSON, ELIZABETH CRISP, HELEN DAVIS,
HAROLD A. DERSHAM, AUDREY D. DERSHAM, his wife, STANLEY ELDER,
ALMA ELDER, his wife, JOHN E. FLANAGAN, ANNA FLANAGAN, his wife,
TROY GEORGE, RICHARD GRAHAM, SHERMA GRAHAM, his wife,
HENRY T. GRAHAM, FRANCIS H. GRAHAM, LILLIAN R. HARTMAN, ANNA C. HENNESSY,
JOEL B. MAYES, JOSEPHINE B. MAYES, his wife, CLIFFORD G. POTTER, VERA POTTER,

1 his wife, S. H. ROBBINS, HARVEY ROBBINS,
2 JR., GEORGE D. ROBERTSON, ELAINE B.
3 ROBERTSON, his wife, JACQUIN LEE BAST-
4 OVAN, RONALD L. ROGER, SUE R. ROGER,
5 his wife, LLOYD TAYLOR, SUSELLE TAYLOR,
6 his wife, MYRON WILCOX, WILHELMINA A.
7 WILCOX, his wife, CLIFTON R. WILSON,
8 ALICE M. WILSON, his wife, HAROLD BELL
9 WRIGHT, ZENDA WRIGHT, his wife, RICHARD
10 H. WRIGHT, PATRICIA L. WRIGHT, his wife,

Complainants,

vs.

11 FORWARD BROS. PROPERTIES, a corporation, and
12 A. L. FORWARD, L. A. FORWARD, JOHN DOE ONE,
13 JOHN DOE TWO, JOHN DOE THREE, JANE DOE ONE
14 and JANE DOE TWO, Individually and as
15 Officers and Directors of said Corporation,

Respondents.

AFFIDAVIT FOR ORDER TO SHOW CAUSE

IN RE CONTEMPT

AND TO REOPEN CAUSE FOR FURTHER
EVIDENCE, ADJUDICATIONS AND DETERMINATIONS

21 STATE OF CALIFORNIA)
22 COUNTY OF TEHAMA) ss

23 HAROLD A. DERSHAM, RICHARD H. WRIGHT, DALE T. CLAY and GEORGE
24 ARCHER, being duly sworn, each for himself, deposes and says:

25 That he makes this affidavit on behalf of each and all of
26 the persons hereinabove named as Complainants. For convenience,
27 said persons will be referred to herein as "Complainants" and
28 FORWARD BROS. PROPERTIES, a corporation, and A. L. FORWARD, L. A.
29 FORWARD, JOHN DOE ONE, JOHN DOE TWO, JOHN DOE THREE, JANE DOE ONE
30 and JANE DOE TWO will be referred to as "Respondents".

1 That Digger Creek is and at all times herein referred to was
2 a natural water course which originates in the Sierra Nevada
3 Mountains east of the town of Manton, California, and flows in a
4 well defined channel in a general southwesterly direction to the
5 point of its confluence with Battle Creek, a tributary of the
6 Sacramento River. Said Digger Creek forms a portion of the
7 boundary line between the Counties of Tehama and Shasta, Calif-
8 ornia, and flows either through or near the lands of Complainants.

9 That on the 12th day of August, 1899, in an action filed in
10 the above entitled court by Nancy A. M. Gransbury, Mary E. Crooker,
11 Theo. Paselk and others, as plaintiffs, against J. T. Edwards,
12 F. W. Graham, Nettie M. Graham, William Bailey and others, as de-
13 fendants, said action being civil #2213, a certain Judgment and
14 Decree was made and entered by the above entitled court, decreeing
15 among other things that the plaintiffs in said action were the
16 owners of a certain water ditch therein described as the Crooker
17 and Hurtt ditch, and were the owners of and entitled to divert
18 through the said ditch for use upon their lands a certain pro-
19 portion of the waters of said Digger Creek specified and defined
20 in said Decree.

21 That the defendants in said action were by the terms of said
22 Decree declared and adjudged to be the owners of certain water
23 ditches named and described in said Decree, and the owners of and
24 entitled to the use of a certain proportion of the waters of
25 said Digger Creek specified and defined in said Decree.

26 A true copy of said Decree made and entered on August 12, 1899,
27 is attached hereto, marked Exhibit "A", and by this reference is
28 incorporated in and made a part of this affidavit. Said Decree
29 is generally known as the "Gransbury Decree" and will for conven-
30 ience be so referred to herein.

31 That on the 16th day of October, 1917, in an action filed
32

1 therein by W. J. Harrison and Anna L. De La Montanya, as
2 plaintiffs, against J. V. Kaler, R. L. Ellis, J.T. Edwards and
3 others, as defendants, said action being civil #3327, a certain
4 Judgment and Decree was made and entered by the above entitled
5 Court, decreeing among other things that the plaintiffs in said
6 action were the owners of a certain water ditch therein described
7 as the Harrison ditch and were the owners of and entitled to divert
8 through said ditch for use upon their lands a certain proportion
9 of the waters of Digger Creek specified and defined in said Decree.

10 A true copy of said Decree made and entered on October 16,
11 1917, is attached hereto, marked Exhibit B, and by this reference
12 incorporated in and made a part of this affidavit. Said Decree
13 is generally known as the Harrison-De La Montanya Decree.

14 On February 24, 1927, in the above entitled action, a certain
15 Judgment and Decree was made and entered wherein the court adjudged
16 and decreed, among other things, that the plaintiffs in said
17 action were the owners in fee as tenants in common of that certain
18 water ditch known as the Crooker Ditch, formerly known as the
19 Crooker and Hurtt Ditch, and were the owners of and entitled to
20 divert from Digger Creek through said ditch a certain proportion
21 of the waters of Digger Creek specifically defined in said Decree,
22 and further adjudging and decreeing that the defendants in said
23 action were the owners as tenants in common of certain ditches
24 named and described in said Decree, and were the owners of and
25 entitled to divert from Digger Creek through said ditches a certain
26 proportion of the waters of said Digger Creek particularly defined
27 in said Decree.

28 A true copy of said Decree made and entered on the 24th day
29 of February, 1927, is for convenience attached hereto, marked
30 Exhibit "C", and by this reference is incorporated in and made
31 a part hereof. Said Decree will hereafter be referred to as the
32 "Herrick-Forward" Decree.

1 Each of the Decrees hereinabove referred to became final and
2 ever since has been and now is a valid and subsisting final decree
3 of the above entitled court.

4 That subsequent to the entry of said Herrick-Forward Decree
5 Complainants John Anderson and Opal Anderson, his wife, Dale T.
6 Clay and Patricia D. Clay, his wife, Edna F. Davidson, Elizabeth
7 Crisp, Helen Davis, Stanley Elder and Alma Elder, his wife,
8 John E. Flanagan and Anna Flanagan, his wife, Clifford G. Potter
9 and Vera Potter, his wife, Troy George, S. H. Robbins and Harvey
10 Robbins, Jr. acquired and are now the owners of that certain water
11 ditch described in said Decree as the Crooker Ditch, and of the
12 respective lands to which the same is appurtenant, and said
13 Complainants succeeded to the ownership of and are entitled to
14 divert from Digger Creek through said Crooker Ditch all of the
15 waters of Digger Creek awarded to the plaintiffs by the terms of
16 said Herrick-Forward Decree.

17 That subsequent to the entry of said Herrick-Forward Decree,
18 Complainants Anna C. Hennessy, Lloyd R. Taylor, Suselle Taylor,
19 his wife, and Ronald L. Roger and Sue R. Roger, his wife, succeed-
20 ed to and are now the owners of the Harrison Ditch and of all of
21 the water rights in Digger Creek awarded to Clare P. Harrison and
22 Anna De La Montanya, by the terms of said Herrick-Forward Decree,
23 and are entitled to divert from Digger Creek through the said
24 Harrison Ditch the amount of water allotted to said Clare P.
25 Harrison and Anna De La Montanya by the terms of said Decree.

26 That subsequent to the entry of said Herrick-Forward Decree,
27 Complainants George Archer, Anna L. Archer, his wife, Clifton R.
28 Wilson, Alice M. Wilson, his wife, and Lillian R. Hartman succeeded
29 to and are now the owners of that certain water ditch described as
30 the Williams Ditch in said Gransbury Decree, and are the owners
31 of and entitled to divert from Digger Creek through said Williams
32 Ditch all of the water allocated and awarded to Frank Williams

1 and Beatrice Williams under the terms of said Gransbury Decree.

2 That subsequent to the entry of said Herrick-Forward Decree,
3 Complainants Bud Ray Alexander, Alma Jean Alexander, his wife,
4 C. R. Battles, Frank Betschart, Anna J. Betschart, his wife,
5 Harold A. Dersham, Audrey D. Dersham, his wife, Stanley Elder and Alma Elder, his wife,
6 Richard Graham, Sherma Graham, his wife, Henry T. Graham, Francis
7 H. Graham, Joel B. Mayes, Josephine B. Mayes, his wife, George
8 D. Robertson, Elaine B. Robertson, his wife, Jacquin Lee
9 Bastovan, Myron Wilcox, Wilhelmina A. Wilcox, his wife, Harold
10 Bell Wright, Zenda Wright, his wife, Richard H. Wright and
11 Patricia L. Wright, his wife, succeeded to and became and now
12 are the owners of those certain water ditches described as the
13 Edwards Ditch, the W. H. Graham Ditch, the Forward Ditch and the
14 Boole Ditch in said Herrick-Forward Decree, and of the water and
15 water rights allocated to said ditches and the owners thereof by
16 the terms of said Decree.

17 Subsequent to the year 1927, said diversion system was
18 consolidated into one ditch, to wit, the Boole Ditch, and the
19 Complainants named in the immediately preceding paragraph are
20 collectively the owners of and entitled to divert through said
21 Boole Ditch all of the waters of Digger Creek allocated by the
22 terms of said Herrick-Forward Decree to the Edwards Ditch, the
23 W. H. Graham Ditch, the Forward Ditch and the Boole Ditch, and
24 the owners thereof.

25 That the Respondent Forward Bros. Properties is, and at all
26 times herein referred to was, a corporation organized under the
27 laws of the State of California, and the defendants A. L. Forward
28 and L. A. Forward are two of the directors of said corporation and
29 are the managing officers and majority stockholders thereof.
30 Affiants do not know the true names of the other directors of
31 said corporation and have therefore designated them by fictitious
32 names, to wit, John Doe One, John Doe Two, John Doe Three, Jane

1 Doe One and Jane Doe Two. When the true names of said directors
2 are ascertained, Complainants herein will move the Court to
3 substitute said names accordingly.

4 Said Forward Bros. Properties is and at all times herein re-
5 ferred to was under the complete direction and control of said
6 A. L. Forward and L. A. Forward as directors, managing officers
7 and majority stockholders of said corporation, and all of the
8 acts of said corporation set forth and alleged herein have been
9 done and performed with the knowledge and pursuant to the express
10 direction of said A.L. Forward and L. A. Forward and any other
11 director or directors of said corporation.

12 That subsequent to the entry of said Herrick-Forward Decree,
13 Respondent Forward Bros. Properties succeeded to and now is the
14 owner of those water ditches known and described in said Herrick-
15 Forward Decree as the Randall or Wilson Ditch, the Campbell and
16 Green Ditch, the North Bergin Ditch, the South Bergin Ditch and
17 the Love's Mill Branch or Ditch, and said corporation is entitled
18 to divert from Digger Creek through and by means of said ditches
19 the amount of water allocated and allowed by said Herrick-Forward
20 Decree and no more, for the purposes defined in said Decree.
21 The head or diversion point of each and all of said ditches
22 is located above the head or diversion point of the respective
23 ditches owned by Complainants as herein set forth.

24 That at the time Respondent Forward Bros. Properties acquired
25 and succeeded to the ownership of the aforesaid water ditches and
26 water rights and the lands to which the same are appurtenant,
27 said corporation and each and all of the Respondents had actual
28 knowledge of the terms and provisions of said Herrick-Forward
29 Decree, including the injunctive provisions thereof, and had
30 full knowledge of all of the water rights and ditch rights therein
31 adjudicated; and said Forward Bros. Properties knowingly acquired
32 said ditch and water rights and the lands to which the same are

1 appurtenant subject to the terms and provisions of said Decree.

2 That notwithstanding such knowledge of the terms and provisions
3 of said Decree, Respondent Forward Bros. Properties, with the
4 knowledge and under the direction of all of the other Respondents
5 herein, has wilfully and wrongfully violated the terms and
6 provisions of said Decree continuously during the irrigating
7 season of the year 1960, commencing in about the month of April
8 and continuing up to the present time, in the following parti-
9 culars:

10 1. Respondent Forward Bros. Properties has during said
11 period diverted from Digger Creek for various uses on and about
12 its premises, amounts of water greatly in excess of the amount
13 to which it was and is entitled under the terms of said Herrick-
14 Forward Decree, and thereby prevented such waters from flowing
15 down to and into the ditches of Complainants. That Respondents'
16 excessive use of said water has been in violation of the rights
17 of Complainants as adjudicated and set forth in said Decree in
18 that Complainants have been deprived of the amount of water to
19 which they are legally entitled, and have been deprived of water
20 greatly needed by them for irrigation and domestic purposes.
21 As a direct result of Respondents' violation of said Decree many
22 of the Complainants have been greatly and irreparably damaged.

23 Respondents have not made any reasonable effort whatever to
24 measure the flow of the waters of Digger Creek diverted by them,
25 but have freely diverted all of the waters of said creek they
26 desired or found it convenient to use. That Respondents recently
27 caused measuring devices to be installed in certain of their
28 ditches but said devices were so constructed that they do not
29 in fact measure the waters diverted, and the excessive, wilful
30 and wrongful diversion of water has continued up to the present
31 time in violation of the terms of said Decree and with the
32 full knowledge of all of the Respondents.

1 2. That said Herrick-Forward Decree provides in part as
2 follows:

3 "That said defendants are entitled to take and
4 divert from the North Fork of Digger Creek in said
5 Section Twenty-four and in and through their Mill
6 Ditch for operating their Saw Mill situated on their
7 said land in said Section Twenty-six 350 inches of
8 water measured under a four-inch pressure, all of
9 said water to be immediately returned to said Digger
10 Creek as soon as it has passed through the said Saw
11 Mill; provided, however, that said Defendants shall
12 be entitled to use fifty inches of said 350 inches
13 of water to carry away sawdust from said Mill through
14 the saw-dust ditch, said fifty inches of said water so
15 used to be immediately returned to said Creek through
16 a Ditch, flume or pipeline to be constructed by said
17 Defendants, after the same has served its purpose in
18 carrying away said Saw-Dust; said fifty inches of water
19 from said Sawdust Ditch not to be allowed to flow down
20 onto the South Bergin field." (page 11 of Decree)

21 Subsequent to the entry of said Decree, Respondent Forward
22 Bros. Properties succeeded to and became the owner of such rights
23 as were by the foregoing provisions of said Herrick-Forward Decree
24 granted to the defendants A. T. Forward, Alice M. Forward and
25 Frank Forward to divert water from the North Fork of Digger Creek
26 for the limited purpose of operating a saw mill.

27 That prior to the year 1958 Respondents or their predecessors
28 in interest diverted water from the South Fork of Digger Creek
29 and used the same to operate the saw mill referred to in the
30 provisions of said Herrick-Forward Decree quoted above; but
31 neither Respondents nor their predecessors in interest ever made
32 any diversion from the North Fork of Digger Creek for such saw mill
33 purposes.

34 That in the spring of 1958 the saw mill operated by Respondents
35 was destroyed by fire, the same being the mill referred to in the
36 said Herrick-Forward Decree. Said saw mill has not been rebuilt,
37 and since the destruction of said mill none of the Respondents
38 has used or is using any of the waters of Digger Creek for saw
39 mill purposes. Continuously since the destruction of said saw
40 mill, however, Respondents have wilfully and wrongfully continued

1 to divert from the South Fork of Digger Creek by means of the pipe
2 line which formerly supplied water for the operation of said saw
3 mill, 350 inches or more of water, to which they have no legal
4 right or claim whatever, and have used and are using the same or
5 a large part thereof on and about their land and premises, without
6 any legal right whatever and in violation of the terms of said
7 Herrick-Forward Decree.

8 That any and all right to the use of the waters of Digger
9 Creek for saw mill purposes wholly terminated upon the cessation
10 of the operation of said saw mill in the spring of 1958, and none
11 of the Respondents now has any right whatever to the use or diver-
12 sion of any of the water allocated for saw mill purposes under
13 the provisions of said Herrick-Forward Decree.

14 That by reason of Respondents' wrongful diversions and use
15 of the waters of Digger Creek, as aforesaid, Complainants have been
16 deprived of the use thereof for irrigation and other beneficial
17 purposes; and by reason of said wrongful diversions there has not
18 during most of the irrigating season been sufficient water in
19 Digger Creek at the head of Complainants' ditches to supply
20 the amount of water to which Complainants are legally entitled,
21 or the amount reasonably required by them for irrigation of their
22 orchards, crops and other vegetation, and for other beneficial
23 purposes.

24 That said Herrick-Forward Decree by its express terms and
25 provisions enjoins and restrains all of the parties to said
26 action and their successors in interest from taking, diverting
27 or using any of the waters of said Digger Creek or any portion
28 thereof in violation of or contrary to the provisions of said
29 Decree. That the Respondents herein have at all times herein
30 referred to had full knowledge of the terms and provisions of said
31 Decree, and have had full knowledge of the fact that any and all
32 right to the diversion or use of any of the water allocated under

1 the provisions of said Decree for saw mill purposes, wholly ceased
2 and terminated at the time of the destruction of said saw mill,
3 but notwithstanding such knowledge Respondents have wilfully and
4 wrongfully and in violation of said Herrick-Forward Decree and
5 in contempt of the above entitled court, continued to divert and
6 use the water allocated for saw mill purposes only, and have
7 threatened to and will continue to use such water for said purposes
8 in violation of the terms and provisions of said Herrick-Forward
9 Decree.

10 That it is necessary that the above entitled cause be
11 reopened, pursuant to the reservation of jurisdiction contained
12 in said Herrick-Forward Decree, for the purpose of taking and
13 receiving such further evidence as shall be deemed necessary and
14 proper to enable the court to interpret and enforce the terms and
15 provisions of said Decree, and to determine and adjudicate any
16 other questions or matters concerning said water rights presented
17 by this affidavit, or any affidavit or pleading filed herein by
18 the Respondents or any of them.

19 WHEREFORE, affiants pray that this court make an order
20 requiring Respondents to appear before the court at a time and
21 place therein fixed and show cause, if any they may have:

22 1. Why they and each of them should not be adjudged guilty of
23 wilful contempt of this court in the violation of the terms and
24 provisions of said perpetual injunction, and be punished accord-
25 ingly.

26 2. Why the above entitled cause should not be reopened
27 pursuant to the reservation of jurisdiction contained in said
28 Herrick-Forward Decree for the receipt of such further evidence
29 as shall be deemed necessary and proper to enable the court to
30 interpret and enforce the terms and provisions of said Decree
31 and to determine and adjudicate any other questions or matters
32 concerning said water rights presented by this affidavit or any

1 affidavit or pleading hereafter filed herein by the Respondents
2 or any of them.

3 That said Decree and perpetual injunction be enforced against
4 said Respondents and each of them and that Complainants have
5 such further relief as may be equitable and proper.

6
7 Harold A. Dersham
8 Harold A. Dersham

9 Richard H. Wright
10 Richard H. Wright

11 Dale T. Clay
12 Dale T. Clay

13 George W. Archer
14 George W. Archer

14 Subscribed and sworn to before me
15 this 8th day of October, 1960.

16 STANLEY PUGH (SEAL)

16 Stanley Pugh, Notary Public, County
17 of Tehama, State of California.

1 PUGH & WEBSTER
2 Attorneys at Law
3 756 Rio Street
4 Red Bluff, California
5 Telephone: LAWrence 7-1117

FILED

OCT 14 1960

6 Attorneys for Complainants

FLOYD A. HICKS
COUNTY CLERK

BY _____ DEPUTY

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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF TEHAMA

10 ALFRED HERRICK, A. NORMAN, JOHN MEYER,
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12 R. L. ELLIS and GEORGE W. BORING,

13 Plaintiffs,

14 vs.

15 A. T. FORWARD, ALICE M. FORWARD, FRANK
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17 COMPANY, a corporation, THOMAS B. ARMSTRONG,
18 LULU NULL, WALTER B. ARMSTRONG, LESTER ARMSTRONG,
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27 MRS. ANNA DE LA MONTANYA, JOHN DOE,
28 RICHARD ROE, MARY SNOW and SUSAN POE,

29 Defendants.

No. 4570

30 BUD RAY ALEXANDER, ALMA JEAN ALEXANDER, his
31 wife, JOHN ANDERSON, OPAL ANDERSON, his wife,
32 GEORGE ARCHER, ANNA L. ARCHER, his wife, C. R. BATTLES,
FRANK BETSCHART, ANNA J. BETSCHART, his wife, DALE T. CLAY,
PATRICIA D. CLAY, his wife, EDNA F. DAVIDSON, ELIZABETH CRISP,
HELEN DAVIS, HAROLD A. DERSHAM, AUDREY D. DERSHAM, his wife,
STANLEY ELDER, ALMA ELDER, his wife, JOHN E. FLANAGAN,
ANNA FLANAGAN, his wife, TROY GEORGE, RICHARD GRAHAM,
SHERMA GRAHAM, his wife, HENRY T. GRAHAM, FRANCIS H. GRAHAM,
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JOSEPHINE B. MAYES, his wife, CLIFFORD G. POTTER, VERA POTTER,

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4 OVAN, RONALD L. ROGER, SUE R. ROGER,
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6 his wife, MYRON WILCOX, WILHELMINA A.
7 WILCOX, his wife, CLIFTON R. WILSON,
8 ALICE M. WILSON, his wife, HAROLD BELL
9 WRIGHT, ZENDA WRIGHT, his wife, RICHARD
10 H. WRIGHT, PATRICIA L. WRIGHT, his wife,

Complainants,

vs.

11 FORWARD BROS. PROPERTIES, a corporation,
12 and A. L. FORWARD, L. A. FORWARD, JOHN DOE
13 ONE, JOHN DOE TWO, JOHN DOE THREE, JANE
14 DOE ONE and JANE DOE TWO, Individually and
15 as Officers and Directors of said Corporation,

Respondents.

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ORDER TO SHOW CAUSE IN RE CONTEMPT

23 HAROLD A. DERSHAM, RICHARD H. WRIGHT, DALE T. CLAY and
24 GEORGE ARCHER, having made and filed herein their Affidavit on
25 behalf of the above named Complainants for an order to show
26 cause against the above named Respondents, wherein it is alleged
27 in substance that certain of the Complainants named in said affidavit
28 are the owners of that certain water ditch described in the Final
29 Judgment and Decree entered in the above entitled action as the
30 Crooker Ditch, and of the water and water rights allocated thereto
31 and of the lands to which the same are appurtenant, that certain
32 other Complainants named in said affidavit are the owners of that
certain water ditch described in said Judgment and Decree as the
Harrison Ditch, and of the water and water rights allocated thereto
and of the lands to which the same are appurtenant; and alleging
further that certain of the other Complainants named in said
affidavit are the owners of that certain ditch described in said
Judgment and Decree as the Williams Ditch, and of the water and

1 water rights allocated thereto and of the lands to which the same
2 are appurtenant; and further that certain of the Complainants named
3 in said affidavit are the owners of those certain ditches described
4 in said Judgment and Decree as the Edwards ditch, the W. H. Graham
5 Ditch, the Forward Ditch and the Boole Ditch, and of the water
6 and water rights allocated to said ditches and of the lands to
7 which the same are appurtenant;

8 And said affidavit further alleging that the above named
9 Respondents have wilfully violated the provisions of said Judgment
10 and Decree, in that they have at various times during the year
11 1960, and continuing up to the present time, wrongfully diverted
12 from the natural waters of Digger Creek above Complainants' res-
13 pective ditches amounts of water greatly in excess of the amount to
14 which said Respondents are legally entitled under the provisions
15 of said Judgment and Decree; and further that Respondents are using
16 upon their lands and premises the waters of Digger Creek allocated
17 under said Decree for saw mill purposes only, and that Respondents
18 have prevented and are preventing the waters of said Creek diverted
19 and used by them, as aforesaid, from flowing down said Digger
20 Creek and into Complainants' ditches, all of which is alleged to
21 be in violation of the injunctive provisions of said Decree; and
22 said affidavit alleging further that by their unlawful and
23 excessive diversions of water from said Digger Creek, Respondents
24 have deprived Complainants of the amount of water to which
25 they have been and now are legally entitled under the provisions
26 of said Judgment and Decree;

27 And said affidavit further alleging that it is necessary that
28 the above entitled cause be reopened, pursuant to the reservation
29 of jurisdiction contained in said Judgment and Decree, for the
30 purpose of taking and receiving such further evidence as shall be
31 deemed necessary and proper to enable the court to interpret and
32 enforce the terms and provisions of said Decree, and to determine

1 and adjudicate any other questions or matters concerning said water
2 rights presented by said affidavit, or any affidavit or pleading
3 filed herein by the Respondents or any of them; and good cause
4 appearing therefor;

5 IT IS HEREBY ORDERED that FORWARD BROS. PROPERTIES, a cor-
6 poration, and A. L. FORWARD, L. A. FORWARD, JOHN DOE ONE, JOHN DOE
7 TWO, JOHN DOE THREE, JANE DOE ONE and JANE DOE TWO, Individually
8 and as officers and directors of said corporation, and each of
9 them, appear before the above entitled court at the courthouse in
10 the City of Red Bluff, California, on Monday, October ~~24~~, 1960, at
11 the hour of 1:45 o'clock p.m., then and there to show cause if any
12 they may have, as follows:

13 1. Why they and each of them should not be adjudged guilty
14 of the wilful contempt of this court in violating the terms and
15 provisions of said Judgment and Decree, and be punished accordingly.

16 2. Why the above entitled cause should not be reopened
17 pursuant to the reservation of jurisdiction contained in said
18 Judgment and Decree, for the receipt of such further evidence
19 as shall be deemed necessary and proper to enable the court to
20 interpret and enforce the terms and provisions of said Decree, and
21 to determine and adjudicate any other questions or matters concern-
22 ing said water rights which are properly raised and presented by
23 said affidavit or any affidavit or pleading hereafter filed herein
24 by the Respondents or any of them.

25 A copy of this order and of said affidavit shall be served
26 on the Respondents herein at least 7 days prior to said
27 hearing.

28 Dated: October 12th, 1960.

29
30 Curtiss E. Wetter

31 Judge
32

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF TEHAMA

11 ALFRED N. HERRICK, et al,
12 Plaintiffs,
13 vs.
14 A. T. FORWARD, et al,
15 Defendants.
16 BUD RAY ALEXANDER, et al,
17 Complainants,
18 vs.
19 FORWARD BROS. PROPERTIES, a
20 corporation, et al,
21 Respondents.
22

No. 4570

23 COMPLAINANTS' OPENING MEMORANDUM

24 I Introductory

25 This proceeding concerns rights to the waters of Digger
26 Creek, which flows through Tehama County in a general east to west
27 direction. Primarily this proceeding is concerned with the
28 interpretation of the decree made by the court in the instant case.
29 However, as an aid to construction of that decree, it is necessary
30 to consider the decrees of this court entered in three other actions.
31 (The Gransbury decree, Wells vs. Pritchard and Harrison vs. Kaler.)

32 All of the decrees involved were at one time or another

1 concerned with certain ditches or other method of diversion of
2 water from Digger Creek. It might be well to list these methods
3 of diversion in the order in which they appeared, commencing
4 upstream, as follows:

- 5 1. Forward Bros. Penstock diversion from the south
6 fork of Digger Creek.
- 7 2. Wilson ditch.
- 8 3. South Bergin ditch.
- 9 4. Campbell ditch.
- 10 5. North Bergin ditch.
- 11 6. Loves Mill ditch.
- 12 7. Big Pritchard ditch.
- 13 8. Little Pritchard ditch.
- 14 9. Forward ditch (while this ditch is actually downstream
15 and west of the Big and Little Pritchard ditches, it was originally
16 taken from Loves Mill ditch at a point prior to its re-entry to
17 Digger Creek below Little Pritchard ditch.)
- 18 10. Boole ditch.
- 19 11. Graham ditch.
- 20 12. Edwards ditch.
- 21 13. Williams ditch.
- 22 14. Crooker ditch.
- 23 15. Harrison ditch.

24 At some point of time prior to the commencement of the
25 instant proceeding the North Bergin and Campbell ditches were
26 combined into one. At a time subsequent to the entry of the decree
27 in this action, the Forward, Boole, Graham and Edwards ditches
28 were combined into one known as the Boole ditch. Neither of these
29 consolidations affected the relative points of diversion from
30 Digger Creek as between complainants and respondent.

31 Complainants derive their water supply through the
32 consolidated Boole ditch, the Crooker ditch and the Harrison ditch.

1 The respondent, Forward Bros., derives its water supply from the
2 Penstock diversion, the consolidated Campbell-Bergin ditch, Wilson
3 and South Bergin ditches and the Loves Mill ditch.

4 The two Pritchard ditches, which lie between the complain-
5 ants' and respondent's respective points of diversion, occupy no
6 important position here, except as it may be noted that the
7 evidence shows that diversions through those two ditches, during
8 the times here in question, were less than their respective
9 adjudicated rights.

10 The Gransbury decree was entered in 1899. It apportioned
11 water among the various ditches, other than the Upper Forward
12 ditches, the Pritchard ditches and the Harrison ditch. Wells v.
13 Pritchard was decided in 1913 and fixed the rights of the
14 Pritchard and North and South Bergin ditches. Examination of
15 the title, as well as the records in that proceeding indicate
16 that the predecessors of all of the parties presently before the
17 court were parties to that proceeding. Harrison vs. Kaler was
18 decided in 1917 and fixed the rights of the Harrison ditch as
19 against the Crooker ditch. The decree under consideration here,
20 was made on February 24, 1927, and fixed the rights of all the
21 parties to this proceeding, or their predecessors, to take water
22 from Digger Creek. Embodied in it were the prior decrees which
23 had adjudicated the rights as between some of them.

24 25 II. Statement of Facts

26 The facts here are essentially very simple. The evidence
27 clearly shows that the complainants, after mid-summer of 1960,
28 were able to take far less water than their entitlement, because
29 of the fact that the flow in Digger Creek, at their respective
30 points of diversion, was insufficient to satisfy their adjudicated
31 rights. On the other hand, during this same period of time the
32 respondent took no less than it was entitled to and often a great

1 of contempt. As a subsidiary issue, there is, of course, the
2 matter of interpretation of the decree in this proceeding.
3 Authorities are of slight, if any, value in this connection since
4 the problem is one of understanding the language employed by the
5 court in the sense in which it is used.

6 Respondent's claim that the practical construction of a
7 judgment by the parties is an aid to interpretation is completely
8 without any basis in law. While the evidence in this regard
9 actually favors complainants more than respondent, such a theory
10 cannot be sustained. It might have some effect upon a claim of
11 estoppel, but as neither of the parties pleaded an estoppel,
12 such an issue is not before the court. Generally, the rules for
13 interpreting contracts apply as well to judgments. It is
14 elementary, however, that the doctrine of interpretation by
15 reference to the actions of the parties cannot apply to a judgment.
16 The intent of parties to a contract may often be determined by
17 their performance under it subsequently, but the intention of the
18 parties has nothing whatever to do with the judgment of a court.
19 The court makes the judgment, and it is its intention alone that
20 is to be determined in the process of interpreting the judgment.
21 The court's intention cannot be gleaned from the actions of the
22 parties. We can use many of the rules for interpreting contracts
23 in interpreting a judgment, but not this one, for we are not
24 concerned with the intention of the parties, but solely with the
25 intention of the court.

26 27 IV. Argument

28 Before taking up the interpretation of the decree in the
29 instant case, it is necessary to explore to some extent the matters
30 covered by the prior decrees mentioned above. These decrees were
31 before the court when it made its judgment herein, and they serve
32 as an unerring guide to the intention of the court.

1 1. The Gransbury decree divided 600 inches of water
2 among the predecessors of the Boole and Crooker
3 ditches.

4 The topic heading here states essentially the basic ruling
5 in the Gransbury decree. That decree mentions the Randolph and
6 Gauthier ditch, but this we have not listed above for the reason
7 that the rights allocated to this ditch became vested in the pre-
8 decessors of the owners of the Boole and Crooker ditches.

9 The decree dealt with 600 inches measured under a four inch
10 pressure, which we will hereinafter refer to as "little inches".
11 It also had two other pertinent provisions. In paragraphs Ninth
12 and Tenth the court declared that if at any time there was more
13 or less than 600 little inches flowing in Digger Creek at the
14 lower owners' point of diversion, they were to take proportionately
15 more or less in their respective ditches than the court awarded
16 them.

17 In paragraph Twelfth the court specifically pointed out
18 that it was only awarding water to certain ditches and not
19 determining the water rights of the respective owners of those
20 ditches as among themselves. This matter will have significance
21 as hereinafter pointed out.

22 2. Wells vs. Pritchard determined that the predecessors
23 of complainants and respondent owned all the waters
24 of Digger Creek, except that awarded to Mounts,
25 Bergin and Pritchard.

26 It should be noted that predecessors of complainants and
27 respondent were the plaintiffs in Wells vs. Pritchard. In the
28 decree entered in that case the court said "That said plaintiffs
29 are entitled to all of the waters of said Digger Creek" for
30 irrigation and other useful purposes, "except as hereinafter
31 adjudged and decreed to the defendants." Immediately preceding
32 that language in the decree the court had said that "Plaintiffs
and their predecessors in interest have taken and diverted and
appropriated from said Creek all of the waters thereof at the heads

1 of their said ditches, during the dry season and during the season
2 of low water in said Creek."

3 The court then went on to award the defendants certain
4 waters of the Creek, as follows:

5 (a) H. F. Mounts, whose point of diversion was above
6 respondent's ditches, was awarded ten inches in the summer and
7 twenty-five inches the rest of the year. This award is unimportant
8 to the present litigation.

9 (b) L. A. Bergin was awarded 20 and 50 "big" inches
10 respectively for the North and South Bergin ditches, with the
11 right to increase the North Bergin ditch to as much as 40 inches,
12 provided he proportionately decreased the diversion through the
13 South Bergin ditch. This water was only to be used upon the land
14 of Bergin lying respectively north and south of Digger Creek.

15 (c) 125 "big" inches was allowed to the big Pritchard
16 ditch for use solely on the Pritchard land on the north of Digger
17 Creek.

18 (d) 18 "big" inches was awarded to the Little Pritchard
19 ditch for use solely on the Pritchard land south of Digger Creek.

20 3. Harrison vs. Kaler adjudicated the rights of
21 the Harrison ditch to waters from Digger Creek.

22 In this decree the court determined that the Harrison ditch
23 was entitled to 40 "little" inches of water from July 1 to
24 October 1 of each year; and thereafter 70 "little" inches from
25 October 1 until the following July 1. The court further decided
26 that the owners of Harrison ditch "are entitled to have enough
27 water flow down the main channel of said Digger Creek to the head
28 of (Harrison) ditch to enable (them) to take and divert from said
29 Digger Creek" the amount of the water previously set forth.

30 The parties to this proceeding who are the successors in
31 interest to the rights in Harrison ditch are Anna C. Hennessy,
32 Ronald L. and Sue R. Roger, and Lloyd and Suselle Taylor.

1 That decree was interpreted in Herrick vs. Forward
2 (paragraph 13) to mean that the rights of the Harrison ditch
3 were primary to the rights of Crooker ditch, even though the
4 latter was upstream from Harrison ditch.

5 4. Herrick vs. Forward incorporated the terms of
6 the three prior decrees without change.

7 In arriving at its decision in Herrick vs. Forward, the
8 court was faced with the three prior decrees, long since final.
9 The court undoubtedly took the position that it could not diminish
10 those adjudicated rights, nor increase them as against anyone
11 else whose rights had been adjudicated. In areas where there had
12 been no adjudication, it did clarify or determine rights.

13 Thus, it took the Gransbury decree insofar as it applied to
14 the parties before the court, and incorporated it into its
15 judgment, with the following additions:

16 (a) It determined the respective interests of the owners
17 of each lower ditch, where the Gransbury decree had not; and

18 (b) It fixed the point of measurement of the waters of
19 Digger Creek above the lower owners' points of diversion for the
20 purpose of determining whether there were more or less than 600 litt
21 inches available for use by the lower owners. (paragraph 11)

22 The court then did the same thing with respect to Wells vs.
23 Pritchard, although making no adjudication with respect to the
24 defendant Mounts in that case who was not a party to Herrick vs.
25 Forward. It should also be noted that at this time respondent's
26 predecessors were then the owners of the Bergin ditches, and the
27 rights thereto were decreed in the same fashion as in the case of
28 Wells vs. Pritchard.

29 Finally, the terms of Harrison vs. Kaler were incorporated
30 into the decree, with the clarification hereinabove mentioned.
31 (paragraph 13).

32 The net result of the foregoing was that up to that point

1 respondent's predecessors were the only ones whose rights to the
2 waters of Digger Creek had not been adjudicated, except as applied
3 to the Bergin ditches. They were the only ones whose rights could
4 be limited in any fashion, and this is what the court then
5 proceeded to do.

6 5. Herrick vs. Forward limited the rights of respondents
7 predecessors in the waters of Digger Creek.

8 In paragraph 16 the court made the following allocations
9 of the waters of Digger Creek to respondent's predecessors.

10 (a) 350 little inches for operation of a saw mill and the
11 clearance of sawdust ponds, but without any right of consumption
12 of any thereof.

13 (b) 20 little inches to the Wilson ditch.

14 (c) 175 little inches to Campbell ditch.

15 (d) 100 little inches to Loves Mill ditch.

16 Prior to the making of the Herrick decree there had been
17 no limitation whatsoever by any judgment of the rights of
18 respondent's predecessors in the above diversions. Those were the
19 only ones which the court could in any way limit, because the
20 owners of all of the other diversions who were parties to the
21 action held adjudicated rights under the three prior decrees.

22 The court did go on and in paragraph 17 alleviate this
23 limitation by making disposition of "surplus waters" of Digger
24 Creek to both complainants and respondents. Before discussing
25 this phase of the decree, it is well to consider the failure of
26 the court to permit all parties to participate in the distribution
27 of surplus waters and the reason therefor. This has a distinct
28 effect upon the over-all interpretation of the decree as herein-
29 after noted.

30 6. The Bergin ditches and Pritchard ditches do not
31 participate in the "surplus waters" of Digger Creek.

32 The court in Herrick vs. Forward expressly eliminated the

1 Bergin and Pritchard ditches from any participation in the
2 "surplus waters" of Digger Creek, as that term is defined in the
3 decree. The reason for this seems clear from a reading of the
4 case of Wells vs. Pritchard. In that judgment, when awarding
5 water to the Bergin and Pritchard ditches, the court specifically
6 states, with respect to each ditch, that it is entitled to the
7 designated number of miner's inches "and no more". In the light
8 of this language used in the prior decree, the court could not
9 increase the rights of the Bergin and Pritchard ditches. Because
10 they could not be enlarged, it does not mean that the rights
11 of the Bergin and Pritchard ditches could not be otherwise
12 affected under appropriate circumstances.

13 7. The parties to the Herrick vs. Forward decree were
14 tenants in common in the waters of Digger Creek,
subject to certain limitations and specific benefits.

15 It is complainants' contention that the rights of
16 respondent to the waters of Digger Creek fluctuated with the rise
17 and fall of the flow of the stream, a contention based upon the
18 decree in the instant case. An examination of that decree in the
19 light of the background above set forth, will show that this is so.

20 The provisions of paragraphs 17 and 18 of the decree are
21 important. In paragraph 17 the court determined that the waters
22 of Digger Creek over and above the amount sufficient to supply
23 the rights adjudicated in the Gransbury decree, Wells vs. F
24 Harrison vs. Kaler and the amounts awarded to the Upper For
25 ditches (other than the Bergin ditches) in the instant case
26 "surplus waters". The court then divided those waters in a
27 fashion as to give complainants two-thirds thereof and res
28 one-third, to be diverted in certain of its ditches other
29 Bergin ditches.

30 In paragraph 18 the court required that the parties
31 proceedings install and maintain weirs "for the measuremen
32 amounts of water allotted to them". The court further required

1 that there should be onewear in the creek and one weir in each
2 ditch.

3 Respondent will undoubtedly argue that because this part of
4 the decree deals only with "surplus waters" and no specific
5 provision is made in the event there is insufficient water to
6 supply the basic rights of all the ditches, respondent may not
7 be required at any time to reduce its diversions below the maximum
8 amounts allocated to it by the decree. This is a fallacious and
9 superficial analysis of the decree.

10 Had the court intended such a result, its decree would have
11 been considerably shortened. It would not have been necessary for
12 the court to incorporate the terms of the Gransbury, Wells vs.
13 Pritchard, and Harrison vs. Kaler decrees. It would only have
14 been necessary to fix the amounts of water permitted to be
15 diverted by the Upper Forward ditches and then provide that those
16 ditches would be entitled to take one-third of the waters of
17 Digger Creek over and above a specified flow. But this is not
18 what the court did nor intended to do.

19 What the court obviously intended was to adopt a plan of
20 water distribution for all of the diverters from Digger Creek.
21 Such a plan could not operate on the basis that the Upper Forward
22 ditches and the Pritchard ditches could take their full adjudi-
23 cated rights, while the complainants, the lower owners, in dry
24 years, would be relegated to what, if any, water was left over.
25 The plan could only operate if, within the limits of the prior
26 decrees, the rights of all diverters fluctuated with the waters
27 of the stream. This is, unquestionably, the reason why the court
28 incorporated the terms of all the prior decrees in the one judgment.

29 It is to be noted that the Bergin ditches and the Pritchard
30 ditches were not permitted to participate in the "surplus waters".
31 The reason for this is likewise clear. As pointed out above,
32 in Wells vs. Pritchard, those ditches were allocated a certain

1 amount of water "and no more". The court accepted this as an
2 adjudication that such ditches were not entitled to any more than
3 the adjudicated rights. On the other hand, this does not mean
4 that the rights of the Bergin and Pritchard ditches would not
5 fluctuate downward, should there be a shortage of water in the
6 creek.

7 Illustrative of this is the court's decree which requires
8 each ditch to maintain not only a weir in the ditch but a weir
9 in the creek for the measurement of water. Insofar as it concerns
10 those ditches which were entitled to "surplus waters", it might
11 be argued that the weir in the creek was for the purpose of
12 determining when the respective ditches were entitled to "surplus
13 waters". However, as to ditches not entitled to "surplus waters",
14 assuming respondent's contention to be correct, there would be
15 no purpose in measuring the water in the creek. All the ditch
16 owner would be concerned with would be the actual flow in his
17 ditch as compared with his adjudicated right. The fallacy of
18 respondent's contention becomes apparent, when it is considered
19 that such ditch owner had to maintain a weir in the creek for the
20 measurement of the flow in the creek. Such a weir could only be
21 used for the purpose of determining when there was a shortage of
22 water and the flow in the creek was inadequate to supply all of
23 the adjudicated rights. In such case, all of the ditch owners
24 are required to proportionately reduce their diversion to absorb
25 their proportionate share of the shortage, and to allow a sufficient
26 amount to flow downstream to enable the downstream owners to
27 participate to the same relative extent.

28 Any other interpretation of the decree in this case ignores
29 the basic tenets of interpretation. The decree must be taken as
30 a whole and each part reconciled with the other. This we have
31 attempted to do by showing, progressively, the terms of the prior
32 decrees as incorporated in the decree entered in this suit, with

1 any additions thereto, and the additional limitations the decree
2 placed upon respondent; and also the additional provisions
3 applicable over-all to all of the parties. Absurd results would
4 be reached were we to attempt to interpret a portion of the decree
5 without considering its affect upon other parts of the decree.

6 We feel that it is not necessary to belabor the point
7 further. It seems clear that the court did not go to all the
8 trouble it did in preparing a lengthy decree merely for the pur-
9 pose of saying that the respondent and the Pritchards could divert
10 562 "little" inches through their ditches (independent of any
11 appropriation through the penstock), before complainants were
12 entitled to receive a drop of water out of Digger Creek. On the
13 contrary, it seems obvious that the court established an over-all
14 plan embracing all diverters from the creek, with each of the
15 respective rights fluctuating up or down, depending upon changes
16 in flow of the waters of the creek.

17 8. Respondent is guilty of contempt for
18 violation of the Decree.

19 The evidence showed that respondent, during the summer of
20 1960, diverted more water than that to which it was entitled under
21 the decree in this case. Disregarding for a moment complainants'
22 interpretation that respondent had merely a fluctuating right in
23 the waters of the creek, it clearly appears that respondent took
24 more water at times than even its interpretation of the decree
25 entitled it to. It presented no measurement of its use during
26 the period in question, but relied solely upon hypothetical
27 estimates of its expert. As a matter of fact, it could present no
28 measurements, for the reason that it had no method of measuring
29 the water it took during most of the summer of 1960. In this
30 respect, also, it committed a contempt of the court, for it
31 ignored the provisions of the decree requiring it to maintain
32 measuring devices. This, respondent freely admits. It further

1 admits that at present the measuring devices it has installed on
2 its Loves Mill Ditch can be so adjusted that its diversion through
3 that ditch can far exceed its adjudicated rights. To what extent
4 this represents good faith on behalf of respondent can only be
5 determined by its past performance.

6 It would seem that, regardless of any diversion of water,
7 respondent has violated the decree by its total disregard of the
8 mandate of the decree that it install appropriate measuring
9 devices. Respondent has been appropriating water "by guess" and
10 "by gosh", taking what it pleased its stockholders and officers
11 to take, in total disregard of the rights of others and its
12 obligations under the decree. An adjudication of its contempt is
13 the only method by which it can be made to realize the extent
14 and nature of its obligations.

15
16 Respectfully submitted,

17
18 Julien R. Bauer
19 Julien R. Bauer
20 Attorney for Complainant Anna C.
21 Hennessy

22 Pugh & Webster
23 Pugh & Webster
24 Attorneys for all other Complainants
25
26
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32

(PR) OF SERVICE BY MAIL—1013a, 2015.5 C. C.

STATE OF CALIFORNIA
COUNTY OF Tehama } ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above entitled action; my residence address is:

756 Rio Street, Red Bluff, California

On November 2, 1961, I served the within Complainants' Opening Memorandum

on the defendants and/ respondents in said action, by placing a true copy thereof enclosed in a sealed envelope

with postage thereon fully prepaid, in the United States post office mail box at Red Bluff, California addressed as follows:

Kronick, Moskovitz & Vanderlaan
Attorneys at Law
926 J Street Building
Sacramento 14, California

Executed on November 2, 1961,
at Red Bluff, California.

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Date _____

Rona J. Mackey

(Signature)

proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

11/17/61

NOV 20 1961
ENDORSED RECEIVED
FLOYD A. HICKS, County Clerk
By Barbara Saunders Deputy
KRONICK, MOSKOVITZ & VANDERLAAN
ATTORNEYS AT LAW
926 J STREET BUILDING
SACRAMENTO 14, CALIFORNIA
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF TEHAMA

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ALFRED N. HERRICK, et al,
Plaintiffs,

vs.

A. T. FORWARD, et al,
Defendants

BUD RAY ALEXANDER, et al
Complainants,

vs.

FORWARD BROS. PROPERTIES, a
corporation,
Respondent.

No. 4570

RESPONDENT'S ANSWERING MEMORANDUM

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Mattos v. Superior Court, 30 Cal. App. 2d 641 (1939), hearing denied	3
Quezada v. Superior Court, 171 Cal. App. 2d 528 (1959), hearing denied	17
Tulare Dist. v. Lindsay-Strathmore Dist., 3 Cal. 2d 489 (1935)	6
Uhler v. Superior Court, 117 Cal. App. 2d 147 (1953), hearing denied	17
Weber v. Superior Court, 26 Cal. 2d 144 (1945)	3
<u>Statutes</u>	
Calif. Stats. 1901, c. 222, p. 660, sec. 1	10
Water Code sec. 1706	18
<u>Texts</u>	
Hutchins, The California Law of Water Rights (1956)	5

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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF TEHAMA

10 ---o0o---

11 ALFRED N. HERRICK, et al,
12 Plaintiffs,

13 vs.

14 A. T. FORWARD, et al,
15 Defendants

16 BUD RAY ALEXANDER, et al
17 Complainants,

18 vs.

19 FORWARD BROS. PROPERTIES, a
20 corporation,
21 Respondent.

No. 4570

22
23 RESPONDENT'S ANSWERING MEMORANDUM

24 INTRODUCTION

25 This proceeding was instituted by complainants, owners
26 of downstream water rights on Digger Creek, to have respondent
27 Forward Brothers Properties, the owner of upstream water rights,
28 held guilty of contempt for alleged violations of the February 24,
29 1927, judgment in this case (hereinafter called "the 1927 decree").

30 This memorandum is in answer to Complainants' Opening
31 Memorandum received November 3, 1961, and is being submitted as
32 provided in the Clerk's Notice of Completion of Reporter's

1 Transcript, dated October 20, 1961.

2 SUMMARY

3 A person cannot be held guilty of contempt for violating
4 an injunction unless the acts constituting the alleged contempt
5 are clearly and specifically prohibited by the terms of the
6 injunction. Irrespective of whether through interpretation the
7 1927 decree might be construed to prohibit respondent from
8 diverting its full decreed rights in times of water shortage, the
9 decree nowhere contains a clear and specific prohibition to that
10 effect. Accordingly, respondent cannot be held guilty of contempt
11 for failing to proportionately reduce its diversions in the summer
12 of 1960 in order to share the available supply with complainants.

13 The 1927 decree, however, means what it says and does not
14 require respondent to reduce its decreed diversions correlatively
15 with complainants when there is a water shortage. That being so,
16 the violations of the decree alleged by complainants are by their
17 own admission "relatively minor". Even as to those alleged minor
18 violations, complainants have failed to sustain their burden of
19 proving beyond a reasonable doubt that respondent was guilty in
20 the summer of 1960 of diverting more water than decreed to it. As
21 to the maintenance of the water measuring weirs, which were orig-
22 inally installed by respondent under the direction of the engineer
23 appointed by the Court pursuant to the 1927 decree and were later
24 destroyed by flood and deterioration, upon respondent first re-
25 ceiving complaints concerning their absence, in the summer of
26 1960, the weirs were promptly reconstructed.

27 ARGUMENT

28 I RESPONDENT CANNOT BE HELD GUILTY OF
29 CONTEMPT FOR DIVERTING FLOWS WHICH
30 IT IS ENTITLED TO DIVERT BY THE PLAIN
31 WORDS OF THE 1927 DECREE

32 Complainants' fundamental contention is that the 1927
decree requires respondent in times of water shortage to reduce

1 its diversions from Digger Creek to flows lower than the diversion
2 rights which the decree awards to it. They concede that while the
3 decree expressly provides for proportionate reduction in diversions
4 by complainants in times of short supply, there is no similar pro-
5 vision governing respondent's diversions (T. p. 11, lines 4-22).
6 The bulk of their opening memorandum (pp. 5-13) is devoted to trying
7 to persuade the Court, however, that this difference in language
8 means nothing, and that respondent should be punished for contempt
9 because it failed to comply with an obscure interpretation of the
10 decree that took complainants eight pages of closely reasoned
11 argument to explain.

12 Complainants have frankly stated that "what interpretation
13 is going to be placed upon the 1927 decree in that regard" (T. p. 11,
14 lines 24-25) is "the very basic issue and actually the fundamental
15 reason for this proceeding" (T. p. 14, lines 4-5). They concede
16 that if their interpretation of the decree is wrong, respondent's
17 alleged violations "are relatively minor" (T. p. 16, line 4). Thus,
18 by their own admission, complainants are seeking through the device
19 of a contempt proceeding to establish an interpretation of the
20 1927 decree which is more to their liking than its plain words.

21 It is clear that even if complainants' interpretation
22 were correct, this contempt proceeding must fail. As the Califor-
23 nia Supreme Court has said:

24 "To hold a person guilty of contempt for violating
25 an injunction, the acts constituting the contempt must
26 be clearly and specifically prohibited by the terms of
27 the injunction. /Cases cited/ The party bound by an
28 injunction must be able to determine from its terms what
29 he may and may not do; he cannot be held guilty of con-
30 tempt for violating an injunction that is uncertain or
31 ambiguous (Ibid.), just as he may not be held guilty of
32 violating a criminal statute that fails to give him
adequate notice of the prohibited acts". (Brunton v.
Superior Court, 20 Cal. 2d 202, 205 (1942), emphasis
added; see also Weber v. Superior Court, 26 Cal. 2d 144,
148 (1945); Hotelling v. Superior Court, 191 Cal. 501,
506 (1923); Mattos v. Superior Court, 30 Cal. App. 2d
641, 649 (1939), hearing denied.)

Nowhere in the 1927 decree is there a clear and specific

1 prohibition against the diversion by respondent during times of
2 water shortage of the flows decreed to it. If such a prohibition
3 is in the decree, it is there only after tortured construction of
4 the language and cannot furnish the basis for a judgment of contempt.

5
6 II THE 1927 DECREE DOES NOT REQUIRE RESPONDENT
7 TO REDUCE ITS DIVERSIONS IN TIMES OF WATER
8 SHORTAGE IN ORDER TO SHARE THE AVAILABLE
9 SUPPLY WITH COMPLAINANTS

10 Respondent cannot agree that even by interpretation
11 there is a prohibition in the 1927 decree against respondent
12 diverting during periods of water shortage the flows set forth
13 as its entitlement under the decree. A careful analysis of the
14 1927 decree and the three earlier judgments which were incorporated
15 into it shows that complainants' interpretation is permeated with
16 error.

17 The first relevant judgment concerning water rights on
18 Digger Creek was in the case of Gransbury, et al v. Edwards, et al,
19 Tehama County Superior Court No. 2213, hereinafter called "the
20 Gransbury decree". The official file of that case has been admitted
21 in evidence in this proceeding as Complainants' Exhibit No. 5 (T.
22 p. 32, lines 17-24). That action was initiated by claimants of
23 water rights to Digger Creek through the Crooker and Hurtt ditch
24 against persons upstream who claimed rights to divert from Digger
25 Creek through ditches then known as (1) the Boole and Wilson ditch,
26 (2) the Forward ditch, (3) the Edwards ditch, (4) the Williams
27 ditch, (5) the Randolph and Gauthier ditch, and (6) the Marshall
28 Edwards and Garrison Graham ditch. No diverters upstream from the
29 Forward ditch were sued.

30 The decree, filed August 12, 1899, awarded specified flows
31 in miner's inches under a four inch pressure to each ditch, as well
32 as an allowance to the ditch of W. H. Graham, who was not a party
(Pars. First-Eighth). The total of these flows was 600 inches under
a four inch pressure. The decree provided that when the flow of

1 Digger Creek at the point of diversion nearest its source was less
2 or greater than 600 inches the rights of the owners of each ditch
3 would be proportionally decreased below or increased above the
4 specified flow rights (Pars. Ninth and Tenth).

5 It is particularly important to note that while the
6 action apparently began as an adversary proceeding, the decree
7 was stipulated to by all parties. Included in the recitals of the
8 Gransbury decree is the following declaration: "And all of the
9 said parties, by and through their said attorneys, having agreed
10 in open Court to a Judgment and Decree in said action as hereinafter
11 set forth...." In other words, the entire decision, including the
12 provision that the owners of its various ditches would share the
13 available supply in times of shortage, was by agreement. In this
14 highly significant respect, the Gransbury decree differs from all
15 of the three subsequent decrees, which resulted from Court deci-
16 sions on contested issues. Had the owners of the various ditches
17 in the Gransbury case chosen to contest their respective priorities,
18 it is highly doubtful that they would all have been held to have
19 correlative rights.

20 Under California law governing rights to the use of the
21 flow of a stream, rights are correlative only among riparian
22 proprietors (Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 335
23 (1907); Calsbad etc. Co. v. San Luis Rey etc. Co., 78 Cal. App. 2d
24 900, 911 (1947)), and not among owners of appropriative rights, as
25 to whom first in time is first in right (Joerger v. Pacific Gas &
26 Electric Co., 207 Cal. 8, 26 (1929); see also Hutchins, The Califor-
27 nia Law of Water Rights (1956), p. 132), or between the owner of a
28 prescriptive right and those against whom it has vested (E. Clemens
29 Horst Co. v. Tarr Min. Co., 174 Cal. 430, 436-37 (1917); Akin v.
30 Spencer, 21 Cal. App. 2d 325, 332 (1937)).

31 That all the parties to the Gransbury decree neither
32 claimed nor had riparian rights is demonstrated not only by the

1 pleadings of the parties (e.g. Complaint in Herrick v. Forward,
2 where only appropriative rights are alleged by owners of the
3 Crooker ditch), but also by the Court's opinion in Wells, et al v.
4 Pritchard et al, Tehama County Superior Court No. 3214. The
5 official file of that case has been admitted in evidence in this
6 proceeding as Complainants' Exhibit No. 6 (T. p. 33, lines 4-10).
7 That opinion, filed May 27, 1913, made it plain that the rights
8 adjudicated in the Gransbury decree were appropriative and not
9 riparian. For example, in discussing the rights of one of the
10 defendants in that case, H. N. Pritchard, the Court stated: "I
11 think it must be conceded that the defendant as an appropriator
12 solely has not the right to take any water from the creek as
13 against the plaintiffs [the successors of the parties to the
14 Gransbury decree] who had theretofore appropriated all the waters
15 of said creek that were reaching their ditches" (Opinion in Wells
16 v. Pritchard, p. 7, emphasis added). The opinion went on to
17 hold that, as a riparian owner, the defendant did, however, have
18 such a right as against the plaintiffs (Ibid.). This is, of
19 course, consistent with a basic tenet of California water law
20 that a riparian right is generally superior to an appropriative
21 right on the same stream (Tulare Dist. v. Lindsay-Strathmore Dist.,
22 3 Cal. 2d 489, 524-25 (1935)).

23 Presumably, appropriators having precisely the same date
24 of priority would also share correlatively when the available
25 supply was less than their total rights. However, it seems clear
26 from the pleadings in the Gransbury case that the parties did not
27 all initially claim precisely the same date of priority.

28 The Gransbury decree thus becomes understandable when
29 it is realized that it was a compromise agreed to by all the parties
30 as a way of settling their dispute without risky and possibly
31 lengthy and costly litigation. As a judgment that has long been
32 final it is, of course, obviously binding on all the parties to it

1 and their successors and none of them can now go behind it (Edmonds
2 v. Glenn-Colusa Irr. Dist., 217 Cal. 436, 439 (1933); Hudson v.
3 Ukiah Water etc. Co., 55 Cal. App. 709, 716 (1921)). However, as
4 was borne out in the later cases, it is equally clear that the
5 Gransbury decree could not bind persons whose rights were not
6 adjudicated. (J. D. Flournoy Co. v. Coffman, 195 Cal. 107, 109-10
7 (1924)). In fact, in each such later case, rights which had not
8 been involved in the Gransbury case were so defined and adjudicated
9 as against holders of rights which had been involved in the Grans-
10 bury case that the Gransbury rights were subordinated to them.

11 The next relevant judgment concerning water rights on
12 Digger Creek was in the case of Wells v. Pritchard, already men-
13 tioned. That judgment was filed May 27, 1913. In that case the
14 plaintiffs were all the parties to the Gransbury decree or their
15 successors. They sued to enjoin upstream diversions by H. N.
16 Pritchard, Thomas J. Pritchard, and L. A. Bergen, whose rights had
17 not been involved in the Gransbury decree, on the claim that
18 plaintiffs owned the rights to the entire flow of Digger Creek.
19 B. F. Mounts was also sued but the dispute with him was settled by
20 stipulation. Except as to the rights of the North and South Bergen
21 ditches, none of the rights of the upper Forward ditches involved
22 in the present contempt proceeding were in issue in Wells v.
23 Pritchard.

24 After the case was tried, the Court stated as follows
25 with respect to the plaintiffs' claim to the entire flow of Digger
26 Creek:

27 "It is evident that it is not true as against these
28 three defendants that the plaintiffs are entitled to take
29 and use all the waters of Digger Creek, and really the
30 question for the Court to decide is how much water, if
31 any, each of said defendants is entitled to as against
32 the plaintiffs in this action. If the defendants are
entitled, as against the plaintiffs, to take any of the
waters of Digger Creek; then, in the interest of all
parties and for a proper decision of the case it becomes
necessary for the Court to fix the amount in inches
which each of said defendants is entitled to take from

1 the creek so that in the future there may be no uncertain-
2 ty or confusion as to their rights, and that the same may
3 be fully understood and observed by all." (Opinion in
4 Wells v. Pritchard, p. 5, emphasis added.)

5 Thereafter, the Court considered the contested claims of
6 the three defendants.

7 As to defendant Thomas J. Pritchard, the Court found
8 that his ditch was one of the very oldest on the creek, his notice
9 of appropriation having been filed in 1873 and water taken out soon
10 thereafter, prior to the initiation of the plaintiffs' rights.
11 From the evidence the Court found further that the amount he actual-
12 ly used and appropriated did not exceed 125 miner's inches. On that
13 basis the Court stated: "As to this defendant, the decree will be
14 that he is entitled to take from Digger Creek through his ditch
15 one hundred and twenty-five miner's inches of water" (Opinion, p.5).
16 Thus, the right decreed to Thomas J. Pritchard in Wells v. Pritchard
17 was an appropriative right, based upon the filing of a notice of
18 appropriation and actual use of water prior to the initiation of
19 the plaintiffs' appropriations.

20 As to defendant H. N. Pritchard, the Court stated:

21 "The evidence shows he has made entry upon 160 acres
22 of government land through which Digger Creek runs.
23 It is therefore riparian to said creek." (Opinion, p. 6)

24 The plaintiffs' contention that this defendant's claim as a riparian
25 proprietor was not sufficiently alleged, was rejected by the Court
26 as follows:

27 "As against an appropriator who is taking waters
28 from the creek, it is sufficient for the plaintiff to
29 allege his riparian ownership and right to the waters,
30 without alleging the amount..." (Opinion, p. 7).

31 Here again, the Court indicated that the parties to
32 the Gransbury decree were appropriative.

33 The Court pointed out that, while this defendant as an
34 appropriator could not divert water as against the plaintiffs, who
35 were prior appropriators, "It is the law of this State that a

1 riparian proprietor as such has a right to use the waters of a
2 stream flowing through his land for domestic and stock purposes
3 and a reasonable amount for irrigation" (Opinion, p. 7). Accord-
4 ingly, the Court concluded that this defendant was "entitled to
5 take through his ditch and use on his land for household, domestic
6 and irrigation purposes a stream not exceeding eighteen inches of
7 water" (Opinion, p. 9).

8 The right decreed to defendant H. N. Pritchard was,
9 therefore, a riparian right which, like Thomas J. Pritchard's prior
10 appropriative right, was superior to plaintiffs' appropriative
11 rights.

12 As to defendant L. A. Bergen, the Court found that he had
13 actually irrigated land owned by him upstream from plaintiffs by
14 diversion from Digger Creek of 20 inches on the north side of the
15 creek and 50 inches on the south side of the creek, and that his
16 claim of title by adverse user was available to the extent of such
17 actual use (Opinion, pp. 10-11). Thus, the right adjudicated to
18 this defendant was apparently a prescriptive right, which was
19 superior to plaintiffs' downstream appropriative rights against
20 which his uses were adverse (Akin v. Spencer, 21 Cal. App. 2d 325,
21 332 (1937)).

22 The Wells v. Pritchard decree, filed June 9, 1913,
23 provided that plaintiffs were entitled to all the water of Digger
24 Creek except as decreed to defendants, and defendants' rights
25 were described consistently with the discussion in the Court's
26 opinion. There is not one word either in the opinion or the decree
27 that remotely suggests that in times of short supply, when plain-
28 tiffs had less than 600 inches to divide among themselves under the
29 Gransbury decree, defendants had the obligation to reduce their
30 diversions below the flows awarded to them. To the contrary, as
31 disclosed by the foregoing analysis of its opinion, the Court
32 clearly awarded the defendants specific diversion rights which were

1 riparian proprietor as such has a right to use the waters of a
2 stream flowing through his land for domestic and stock purposes
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5 take through his ditch and use on his land for household, domestic
6 and irrigation purposes a stream not exceeding eighteen inches of
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27 that remotely suggests that in times of short supply, when plain-
28 tiffs had less than 600 inches to divide among themselves under the
29 Gransbury decree, defendants had the obligation to reduce their
30 diversions below the flows awarded to them. To the contrary, as
31 disclosed by the foregoing analysis of its opinion, the Court
32 clearly awarded the defendants specific diversion rights which were

1 prior and superior to the rights of the plaintiffs. Had the Court
2 intended that all the parties should have correlative rights under
3 which shortages were to be shared proportionately, language similar
4 to that used in the Gransbury decree to reach that result could
5 easily have been included. The fact that such language was not
6 included cannot be ignored.

7 It is significant also that the rights decreed to defend-
8 ants. Thomas J. Pritchard, H. N. Pritchard, and L. A. Bergen in
9 the Wells v. Pritchard decree were described in terms of inches
10 without specifying the pressure. By contrast, the right of defend-
11 ant B. F. Mounts, which had been stipulated to by plaintiffs, was
12 described in terms of inches under a four inch pressure. Wells
13 v. Pritchard was instituted in 1911 and decided in 1913, well after
14 the adoption in 1901 of the statutory definition of standard miner's
15 inch as meaning in effect an inch of flow under a 6 inch pressure
16 (Calif. Stats. 1901, c. 222, p. 660, sec. 1). Hence, we agree with
17 complainants that the absence of a specification of pressure in
18 describing the Pritchard and Bergen rights means that they are in
19 terms of miner's inches under a 6 inch pressure or "big inches"
20 (Complainants' Opening Memorandum, p. 7, lines 9-19).

21 The last relevant judgment concerning Digger Creek water
22 rights prior to the 1927 decree was in the case of Harrison et al
23 v. Kaler et al, Tehama County Superior Court No. 3227. That
24 judgment was filed October 16, 1917. The official file of that case
25 has been admitted in evidence in this proceeding as Complainants'
26 Exhibit No. 7 (T. p. 33, lines 12-18). In that case the plaintiffs
27 Harrison and De La Montanya, claiming rights to divert Digger Creek
28 flows through the Harrison ditch, the lowermost ditch on Digger
29 Creek, sued the owners of the Crooker ditch. The judgment was that
30 as against the defendants, the two plaintiffs had the right as
31 tenants in common to divert into their ditch and use 70 inches of
32 water of Digger Creek from October 1 until July 1 and 40 inches

1 from July 1 until October 1, measured under a four inch pressure,
2 and were entitled to have enough water flow down the main channel of
3 Digger Creek to the head of their ditch to enable them to divert
4 such amounts. In this judgment, as in Wells v. Pritchard, there
5 was no provision for the sharing of shortages by the parties during
6 dry periods.

7 Making the same error as complainants in the present
8 contempt proceeding, the defendants in Harrison v. Kaler believed
9 that the plaintiffs' rights were, nevertheless, subject to reduction
10 in periods of shortage in order to preserve some water for the de-
11 fendants. When a shortage occurred in the summer of 1920, the
12 defendants diverted water into their Crooker ditch at times when
13 less than the required forty inches was reaching the Harrison ditch.
14 Upon the institution of a contempt proceeding by the plaintiffs, the
15 Court rendered an opinion filed September 15, 1920, in which the
16 defendants' theory concerning the sharing of short supplies was
17 sharply rejected:

18 "In order that there may be no misunderstanding of
19 the proposition, the Court deems it proper to state
20 emphatically that by the decree it was adjudged that the
21 plaintiffs have forty inches of water flow to the head
22 of their ditch. There is no question of the proportion
23 of pro rata. The decision was absolute that forty inches
24 should flow down to their ditch when there was that much
25 water flowing in the creek and the owners of the Crooker
26 ditch have no right to take any water in their ditch at
27 any time when there is not enough flowing in the creek to
28 make forty inches of water at the head of the plaintiffs'
29 ditch." (Opinion re contempt in Harrison v. Kaler, p. 5,
30 emphasis added.)

31 It should be noted that the owners of the Crooker ditch
32 have apparently still not learned their lesson. In the summer of
33 1960 when the Harrison ditch was receiving practically no water
34 (T. p. 266, lines 4-25; T. p. 270, lines 6-9), water was still
35 being diverted into the Crooker ditch (T. p. 254, lines 16-18;
36 T. p. 255, line 17 - p. 257, line 5; T. p. 272, line 18 - p. 273,
37 line 2), in direct violation of the Harrison v. Kaler decree and
38 Paragraph 13 of the 1927 decree, which incorporated the restrictions

1 of the Harrison v. Kaler decree. It is interesting to speculate
2 why the owners of the Harrison ditch rights chose to join as com-
3 plainants in the present contempt proceeding against respondent
4 instead of taking action against the Crooker ditch owners, who
5 were clearly in contempt.

6 Our chronology now brings us to the 1927 decree. The
7 case of Herrick v. Forward was brought by the owners of the
8 Crooker ditch. From their complaint it is clear that as one of
9 their major objectives they sought to establish a right to a one-
10 fourth proportionate share of the flow of Digger Creek (Complaint
11 in Herrick v. Forward, filed October 30, 1923, Par. V, Prayer
12 Par. (b)). In other words, the owners of the Crooker ditch were
13 trying then, as they are now, to enforce correlative rights in the
14 flow of Digger Creek as against all the defendants.

15 The only rights brought in issue in Herrick v. Forward
16 which had not previously been adjudicated in the Gransbury, Wells
17 v. Pritchard, or Harrison v. Kaler cases were the rights of the
18 defendants Forward in the penstock or Mill ditch, the Randall or
19 Wilson ditch, the Campbell and Green ditch, and the Love's Mill
20 Branch of Digger Creek. (The rights to the North and South Bergen
21 ditches, which the Forwards had acquired by the time the case of
22 Herrick v. Forward was filed, had previously been adjudicated in
23 Wells v. Pritchard as we have seen.) One of complainants' basic
24 errors in their position in the present proceeding lies in their
25 misunderstanding of the significance of this fact.

26 Complainants state that these previously unadjudicated
27 rights of the Forwards "were the only ones which the Court could in
28 any way limit, because the owners of all of the other diversions
29 who were parties to the action held adjudicated rights under the
30 three prior decrees" (Complainants' Opening Memorandum, p. 9, lines
31 18-21; see also p. 9, lines 3-4). In other words, complainants
32 seem to believe that once there has been a judgment defining water

1 rights as between the parties to the judgment, the rights somehow
2 become fixed and immutable against all the world as though the
3 judgment were in rem. This is directly contrary not only to settled
4 law (J. D. Flourney Co. v. Coffman, 195 Cal. 107, 109-10 (1924)),
5 but also to the decrees in both Wells v. Pritchard and Harrison v.
6 Kaler. In each of them, the rights previously adjudicated in the
7 Gransbury decree were limited by being made subordinate to the
8 rights which were adjudicated for the first time in those cases.

9 The situation in Herrick v. Forward was in essence the
10 same as in these two prior cases. Certain of the rights involved
11 had been previously adjudicated. The principal problem was to
12 determine how additional rights not previously adjudicated fitted
13 in against the adjudicated rights of those who were challenging the
14 unadjudicated rights. In their answer and cross-complaint, the
15 Forwards alleged that the lands served by their previously unadjudi-
16 cated ditches were riparian, and that by reason of that riparian
17 character as well as prior appropriation and use of water thereon
18 they had the right to the use of a specified total flow of water
19 (Par. VIII).

20 There is no opinion of the Court on file in Herrick v.
21 Forward, so it is not possible to reconstruct the Court's reasoning
22 as we have been able to do in connection with Wells v. Pritchard
23 and Harrison v. Kaler. Nevertheless, the intent and effect of the
24 1927 decree is clear.

25 First, with certain exceptions, the results of the three
26 previous decrees were incorporated. The 1927 decree went beyond
27 the Gransbury decree in one respect -- breaking down the rights
28 adjudicated to the various ditches into individual rights; and
29 covered less than the Gransbury decree in another respect -- the
30 omission of the Williams ditch right of fifty-five inches and
31 the Randolph right of twelve and a half inches. This omission
32 seems to be the reason why the rights based on the Gransbury decree

1 described in Subdivision 3 through 8 of the 1927 decree total 532½
2 inches instead of the 600 inches adjudicated in the Gransbury
3 decree. The 1927 decree also omitted the right adjudicated to B.
4 F. Mounts in Wells v. Pritchard.

5 Second, the 1927 decree made an adjudication of the
6 previously unadjudicated upper ditch rights owned by the Forwards.
7 These rights were each described in terms of specified flows without
8 any provision for reduction in times of short supply in order to
9 ease the shortage of the Gransbury decree rights. It is, therefore,
10 reasonable to infer from this fact alone that the Court had found
11 in favor of the Forwards' allegations that their rights were prior
12 and superior to the Gransbury decree rights by virtue of the ripar-
13 ian character of the land served and prior appropriation.

14 Except for the fact that these previously unadjudicated
15 rights were described in the 1927 decree as being under a four inch
16 instead of a six inch pressure, the form and language used are
17 comparable to the description in the decree of the Pritchard and
18 Bergen ditch rights. Hence, if it is proper to imply a pro rata
19 reduction in these previously unadjudicated rights during periods
20 of shortage, such reduction would apply equally to the Pritchard
21 and Bergen rights. This, of course, is the very result that com-
22 plainants seek (Complainants' Opening Memorandum, p. 10, lines
23 9-12; p. 11, lines 21-27; p. 12, lines 3-6).

24 However, such a limitation of the Pritchard and Bergen
25 ditch rights would be a drastic revision of the Wells v. Pritchard
26 decree. Had the Court been of a mind to do this, is it not rea-
27 sonable to expect that it would have plainly said so? And how
28 could such a revision be justified? The decree in Wells v. Prit-
29 chard was a final decree and just as binding on the parties as
30 any of the other earlier decrees. Complainants declare that:

31 "In arriving at its decision in Herrick v. Forward,
32 the Court was faced with three prior decrees, long since
final. The Court undoubtedly took the position that it

1 could not diminish those adjudicated rights, nor increase
2 them as against anyone else whose rights had been adjudi-
3 cated." (Complainants' Opening Memorandum, p. 8, lines
4 9-11.)

5 In the face of this statement, how can complainants consistently
6 contend that the Pritchard and Bergen rights could be or were in-
7 tended to be subjected to pro rata reduction by the 1927 decree?
8 This difficulty may explain why complainants have sought to persuade
9 the Court that the Wells v. Pritchard decree "is not of great
10 moment here" and "is of relatively minor importance in this case"
11 (T. p. 6, lines 9, 24-25).

12 And how would complainants treat the Harrison ditch rights
13 adjudicated in Harrison v. Kaler? Under complainants' theory, do
14 those rights also share pro rata in shortages? Complainants are
15 somewhat vague and ambiguous on this question.

16 First, they say: "The parties to the Herrick v. Forward
17 decree were tenants in common in the waters of Digger Creek, sub-
18 ject to certain limitations and specific benefits" (Complainants'
19 Opening Memorandum, p. 10, lines 13-14).

20 Then they say: "The plan which complainants contend the
21 Court intended to adopt in the 1927 decree⁷ could only operate if,
22 within the limits of the prior decrees, the rights of all diverters
23 fluctuated with the waters of the stream" (Ibid., p. 11, lines
24 25-27).

25 Finally, they say: "...It seems obvious that the
26 Court established an over-all plan embracing all diverters from
27 the creek, with each of the respective rights fluctuating up or
28 down, depending upon changes in flow of the waters of the creek"
29 (Ibid., p. 13, lines 13-16, emphasis added).

30 However, nowhere do they say forthrightly whether in their
31 view the Harrison ditch rights are or are not subject to pro rata
32 reduction with all the other rights. Complainants' vagueness and
reluctance on this question are understandable, for they are truly

1 caught on the horns of a dilemma. If they say that those rights are
2 not subject to pro rata reduction while all others are, how do they
3 explain the logic or legal basis of this preferred status? If they
4 say that those rights are subject to pro rata reduction with all
5 other rights, they go directly contrary to the decision in the
6 Harrison v. Kaler contempt proceeding previously discussed.

7 Of course, the simple, consistent answer to complainants'
8 troublesome problems is that neither the Harrison ditch rights, nor
9 the Pritchard ditch rights, nor the Bergen ditch rights, nor the
10 rights of any of the other upper Forward ditches were made subject
11 to pro rata correlative reduction in times of short supply by any
12 of the decrees. The only rights that are subject to such reduction
13 are those adjudicated in the Gransbury decree, where such a result
14 was expressly and unmistakably provided. None of the other rights
15 were so limited, either in the decree where they were first adjudi-
16 cated or as incorporated in the 1927 decree,
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III COMPLAINANTS HAVE FAILED TO ESTABLISH
THAT RESPONDENT DIVERTED MORE WATER
THAN ALLOWED BY THE 1927 DECREE

Complainants ^{argue} agree that even though their interpretation of the decree is wrong and respondent's rights are not subject to diminution below the decreed amounts in times of shortage, the evidence in this proceeding showed that respondent violated the decree by diverting more than the decreed amounts at times during the summer of 1960, and therefore is guilty of contempt (Complainants' Opening Memorandum, p. 13, lines 19-25). However, complainants concede that any such violations "are relatively minor" (T. p. 16, line 4).

As stated by the California Supreme Court, "It has repeatedly been held that an accused on trial for contempt must be proved guilty beyond a reasonable doubt" (Bridges v. Superior Court, 14 Cal. 2d. 464, 485 (1939); see also Hotaling v. Superior Court, 191 Cal. 501, 505 (1923); Quezada v. Superior Court, 171 Cal. App. 2d 528, 529-30 (1959), hearing denied; Uhler v. Superior Court, 117 Cal. App. 2d 147, 151 (1953), hearing denied; In re Lande, 96 Cal. Apps. 2d 926, 930 (1950).

We believe an analysis of the evidence shows that there has not been proof beyond a reasonable doubt that respondent at any time diverted greater total flows than its decreed rights permit. To the contrary, the preponderance of the evidence is the other way.

Respondent's Exhibit E in evidence in this proceeding (T. p. 305, lines 3-12) tabulates respondent's rights as set forth in the 1927 decree. Converting the decreed amounts to cubic feet per second so as to have a common base, these rights total 7.65 cubic feet per second for consumptive purposes and 7.0 cubic feet per second for non-consumptive purposes. The North and South Bergen ditch rights were converted on the basis of 40 inches equalling one cubic foot per second in accordance

1 with the conclusion that those rights were decreed in terms
2 of the statutory miner's inch.

3 Complainants apparently do not now contest that re-
4 spondent may change the respective amounts diverted through its
5 various diversion facilities from the amounts specified in the
6 1927 decree, as long as it does not exceed a total of 7.65
7 cubic feet per second for consumptive use and a total of 7.0
8 cubic feet per second for non-consumptive use and the impact on
9 the downstream rights is not thereby increased. Such changes
10 in point of diversion and use under decreed rights is authorized
11 by Water Code Section 1706 (Byers v. Colonial Irr. Co., 134 Cal.
12 553 (1901)). Indeed, complainants are in no position to challenge
13 the legality of such changes. After the 1927 decree, complain-
14 ants or their predecessors consolidated, into the Boole ditch,
15 diversions which under the 1927 decree were to be taken through
16 other ditches of complainants that have since been abandoned
17 (Complainants' Opening Memorandum, p. 2, lines 26-28; T. p. 95,
18 lines 2-21; T. p. 250, lines 11-17). The official file of
19 Herrick v. Forward reveals that no Court approval of this change
20 was sought or obtained.

21 The Court's Exhibit Alpha in evidence in this proceed-
22 ing tabulates the measurements, made by or under the direction
23 of complainants' engineer, of diversions to consumptive use
24 through the various diversion facilities of respondent (T. p. 275,
25 lines 21-24). Complainants' engineer testified to these same
26 measurements (T. pp. 75-87). These are the only measurements of
27 respondent's diversions in evidence in this proceeding.

28 In Respondent's Exhibit F in evidence in this proceeding
29 (T. p. 309, line 10 - p. 310, line 1), these measurements are
30 tabulated into totals for each day in which measurements were made
31 so as to compare the total diverted rate of flow on each such day
32 with respondent's total decreed rights. In addition, Respondent's

1 Exhibit F calculates and adds to the measurements the estimated
2 diversions to consumptive use from the penstock during the
3 summer of 1960. These penstock diversions were calculated on
4 the basis of the actual uses to which they were put. These
5 actual uses were (1) the irrigation of about fifteen acres
6 of strawberries irrigated by sixty sprinklers rated at five
7 gallons per minute each (T. p. 376, lines 5-10), and (2) domestic
8 service to a total of about fourteen homes and irrigation of about
9 one and one-half acres of lawn and garden around these homes (T.
10 p. 374, lines 21-24; T. p. 376, lines 1-10; T. p. 311, line
11 8 - p. 314, line 15).

12 The total diverted flow on each day of measurement as
13 shown on Respondent's Exhibit F was well within the total of
14 respondent's decreed rights shown on Respondent's Exhibit E with
15 one exception. That exception was September 3, 1960. Testimony
16 disclosed that there had been unseasonal rainfall the night before
17 (T. p. 109, lines 11-12; T. p. 177, lines 17-26), and examination
18 of the Court's Exhibit Alpha shows that this had the inevitable
19 result of suddenly increasing the flows at every point of measure-
20 ment in the entire stream system. Complainants' and respondent's
21 engineers agreed that the rain, rather than respondent's actions,
22 was the probable cause of this excessive total diversion (T. p.
23 109, lines 11-23; T. p. 315, line 20 - p. 317, line 15).

24 Thus we see that, except for the one day following the
25 unseasonal rain, respondent was in compliance with the diversion
26 limitations in the 1927 decree.

27 Complainants' engineers took the position at the trial
28 that to the measured amounts there should have been added one
29 and one-half cubic feet per second for diversions to consumptive
30 use from the penstock, rather than the amount calculated by
31 respondent's engineer in Respondent's Exhibit F (e.g. T. p. 67,
32 lines 7-11). There was no reasonable justification for this

1 position. It was simply an arbitrary assumption based upon
2 lack of information as to where the water diverted into the
3 penstock actually went (e.g. T. p. 96, line 2 - p. 102, line
4 9). It assumed hypothetical additional uses above those for
5 irrigation of the strawberries and the domestic use and lawn
6 and garden irrigation in and around the fourteen homes, about
7 which there was no testimony and which each of complainants'
8 witnesses who was questioned on the subject said they had no
9 knowledge (T. p. 171, lines 9-19; T. p. 198, line 5 - p. 199,
10 line 14). Clearly, on this record, the evidence supporting
11 diversions at one and one-half cubic feet per second from the
12 penstock to consumptive use falls far short of proof beyond
13 a reasonable doubt.

14 As to non-consumptive use, there is no testimony what-
15 soever that more than the decreed 7.0 cubic feet per second was
16 being diverted by respondent to such use during the summer of
17 1960. Rather, complainants' objection appears to be an unsupport-
18 ed apprehension that there is more loss of water through evapora-
19 tion and seepage from the present fish ponds than there used
20 to be in connection with the removal of sawdust provided for in
21 Subdivision 16(1) of the 1927 decree. On this issue, respondent's
22 engineer testified that in his opinion the losses were substantial-
23 ly the same (T. p. 314, line 19 - p. 315, line 10). Complainants'
24 engineer apparently agreed that the substitution of fish ponds
25 for an equal number of sawdust ponds would not necessarily result
26 in any additional loss of water to the stream system (T. p. 105,
27 lines 8-19). Respondent's president testified that the four
28 ponds now used for fish had been used as log and sawdust ponds
29 before the sawmill burned down in 1958 (T. p. 371, line 3; T.
30 p. 372, lines 10-25; T. p. 392, lines 7-26). Moreover, there
31 is no clear testimony anywhere in the record establishing that
32 the losses have increased over those which occurred in the prior

1 logging and sawdust removal operations. This being the case,
2 complainants did not even remotely approach proving this con-
3 tention beyond a reasonable doubt.

4 IV RESPONDENT PROMPTLY RECONSTRUCTED
5 WEIRS TO MEASURE ITS DIVERSIONS
6 WHEN COMPLAINTS WERE RECEIVED IN
7 THE SUMMER OF 1960

8 After the 1927 decree was signed, water measuring
9 weirs were installed throughout the Digger Creek system, in-
10 cluding the upper Forward ditches, under the supervision of
11 W. F. Luning, the engineer appointed by the Court; and A. L.
12 Foxward, respondent's president, participated in this work as
13 a young man (T. p. 358, line 15 - p. 359, line 14). He had
14 no knowledge of any such weirs being installed in the channel
15 of Digger Creek, ^{upstream} from the Forward ditch, i.e. upstream
16 from the ditches first adjudicated in the Gransbury decree
17 (T. p. 365, lines 4-6). In 1937, which was an extremely heavy
18 flood year, all the weirs on the upper Forward ditches except
19 one on the South Bergen ditch were washed out (T. p. 365, lines
20 7-14). Apparently Frank Forward, now deceased, who was the
21 uncle of respondent's president and who actually took care of
22 the diversion of water from the upper Forward ditches between
23 about 1931 and sometime in the 1950's (T. p. 382, line 25 - p. 383,
24 line 14), reinstalled the weirs on his own (T. p. 383, line 20 -
25 p. 384, line 4). The Court's engineer appointed under the 1927
26 decree had long since resigned and no successor had been appointed,
27 nor has one been appointed to the present time. These weirs
28 remained until the middle 1940's when they also were destroyed
29 by high water and deterioration (T. p. 384, lines 5-17).

30 The weirs were reconstructed in the summer of 1960
31 (T. p. 384, lines 20-22), promptly after complaints were made to
32 respondent's president by complainants about the absence of weirs
(T. p. 366, lines 2-26; T. p. 368, line 24 - p. 369, line 13).

1 There is no evidence that prior to 1960 anyone complained to re-
2 spondent or its predecessors in ownership about the absence of
3 weirs, and respondent's president testified that to his knowledge
4 no such complaints were made (T. p. 365, line 21 - p. 366, line 6).

5 While the failure to have weirs installed during the
6 period prior to 1960 was a technical violation by the decree,
7 we believe it is significant that there were no complaints about
8 it, that generally there was ample water for every one on the
9 stream (T. p. 163, lines 2-7; T. p. 206, line 9 - p. 207, line 8;
10 T. p. 261, lines 12-14; T. p. 365, lines 17-18), and that promptly
11 upon complaints being received the weirs were reconstructed and
12 were in operation before the current contempt proceeding was started.

13 CONCLUSION

14 For the reasons stated herein, it is urged that the
15 Court should hold that respondent has not violated the decree
16 except in a minor technical respect that has since been cured,
17 and that there is no basis for adjudging respondent guilty of
18 wilful contempt or imposing any punishment on it.

19 Dated: November 17, 1961.

20 KRONICK, MOSKOVITZ, & VANDERLAAN

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22
23 By /s/ Adolph Moskovitz
ADOLPH MOSKOVITZ

24 Attorneys for Respondent Forward
25 Brothers Properties
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CERTIFICATE OF SERVICE

Brenda L. Kocher certifies under penalty of perjury as follows:

That she is a citizen of the United States, over the age of eighteen years, and not interested in the above-entitled matter; that on November 17, 1961, she deposited in the United States Post Office, at the City of Sacramento, County of Sacramento, State of California, a true copy of Respondent's Answering Memorandum, hereto attached, enclosed in a sealed envelope with the postage thereon prepaid, addressed to Julien R. Bauer, Attorney at Law, 369 Pine Street, San Francisco 4, California, attorney for Complainant Anna C. Hennessy, and to Pugh & Webster, Attorneys at Law, 756 Rio Street, Red Bluff, California, attorneys for all other Complainants.

Dated: November 17, 1961.

/s/ Brenda L. Kocher